KAOLIM PTE. LTD.

v.

UNITED OVERSEAS LAND LTD.

PRIVY COUNCIL
LORD DIPLOCK
LORD KEITH OF KINKEL
LORD ROSKILL
LORD BRIGHTMAN
JOHN MEGAW
[APPEAL NO. 34 OF 1981]
13 DECEMBER 1982

LAND LAW: *Mortgage - Sale by mortgagee to recover amount due from mortgagor - Prior charge on the mortgaged property - Contract for sale - Whether free from or subject to the charge for the property tax - Pre-completion tax - Whether the purchaser or mortgagor to bear - Question of subrogation.*

In 1976 the appellant bought a piece of property in Singapore and mortgaged it to Far Eastern Bank Limited (the bank) to secure part of the purchase price. To recover the $5,000,000 due from the appellant on 10 March 1980 the bank offered the property for sale by tender. United Overseas Land Limited (respondent) submitted its tender for $8,000,000 which was accepted by the bank. Meanwhile on 31 March 1980 the Comptroller of Property Tax notified the bank of his claim to arrears of property tax amounting to $521,242.53 being tax arrears up to 31 December 1979 ($459,291.43) and for the first half of the year 1980 ($55,025) plus $6926.10 being penalty, interest and fees. Both the bank and the respondent denied responsibility.

The question raised was whether, on a sale by a mortgagee, a prior charge on the mortgaged property falls to be discharged by the purchaser from the mortgagee or is a burden on the net proceeds of sale payable to the mortgagor. The dispute was who should bear the pre-completion tax, whether the purchaser or the mortgagor.

An originating summons between the respondent as plaintiff and the bank and the appellants as defendants, was decided in favour of the respondent. The Court of Appeal, Singapore dismissed the appeal by the appellant and therefore this appeal by the appellant.

Held:
The question of subrogation did not arise. The respondent purchased the mortgagor's (appellant's) land free from property tax.

[Appeal dismissed.]

Legislation referred to:
Porperty Tax Act [Sing], ss. 6(1), (2), (3), 34(1), (3), 35(1)

JUDGMENT

Lord Brightman:

This appeal from a decision of the Court of Appeal in Singapore raises the question whether, on a sale by a mortgagee, a prior charge on the mortgaged property falls to be discharged by the purchaser from the mortgagee, or is a burden on the net proceeds of sale payable to the mortgagor. The charge is a statutory one for arrears of property tax relating to a period

which straddles the completion of the sale. It is common ground that the post-completion apportionment of the tax falls on the purchaser. The dispute is whether the purchaser or the mortgagor must bear the pre-completion tax.

In 1976 Kaolim Private Limited (the mortgagor) bought a property known as Kaolim Building, Kramat Lane, Singapore, and mortgaged it to Far Eastern Bank Limited (the bank) to secure part of the purchase price. On 10 March 1980 the bank, in exercise of its power of sale, offered the property for sale by tender. The amount due to the bank was about $5,000,000. On 20 March the tender of United Overseas Land Limited (the purchaser) in the sum of $8,000,000 was accepted by the bank, together with a 20 per cent deposit which accompanied the tender. On 31 March the Comptroller of Property Tax notified the bank of his claim to arrears of property tax amounting to $521,242.53. This was made up of arrears to 31 December 1979 ($459,291.43), tax for the half year to 30 June 1980 ($55,025) and $6926.10 penalty, interest and fees. The bank replied to the Comptroller that in its view the tax was the responsibility of the purchaser. This was not accepted by the purchaser, which on 9 April issued an originating summons, making the bank and (by amendment) the mortgagor respondents. The purchaser sought, in effect, a declaration that the property was contracted to be sold free from the charge for arrears of property tax; alternatively, that if under the contract of sale the purchaser was liable as between itself and the bank to discharge the arrears of tax, it could claim the amount so paid from the mortgagor on the principle of being subrogated to the rights of the Comptroller.

When speaking hereafter of arrears of property tax, their Lordships will leave out of account the apportioned tax arising after completion, for which the purchaser accepts responsibility.

Their Lordships now refer to the particulars and conditions of sale. The particulars contained a description of the property and, as one would expect, made no reference to incumbrances. The conditions of tender, so far as relevant for present purposes, provided as follows:

> 10. The purchase shall be completed and the balance of the purchase price shall be paid on 21 day of 1980...
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> 12. The title of the property shall be properly adduced.
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> 16. The property is sold subject to:
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> (a) any scheme, layout, matter or thing embodied or shown in the General Improvement Plan and/or the Master Plan and all proposed amendments or addition thereto;
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> (b) any proposed scheme affecting the property; and
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> (c) all notices, charges, Orders of Court, charging orders, caveats and Court or other claims affecting the property made or served whether before on or after the date of Sale. The Purchaser shall be deemed to have purchased with full knowledge and notice of all such schemes or proposed schemes, layouts, notices, demands, charges, Orders of Court, charging orders, caveats and Court or other claims which shall be complied with and discharged by and at the expense of the Purchaser who shall not be entitled to make or raise any objection or requisition whatsoever in respect thereof.
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> 22. The purchaser shall not require any evidence that Estate Duty has been paid in respect of any death that occurred before the date of sale and no objection or requisition shall be made on the ground that such Estate Duty has not been paid nor shall the non-payment of such duty annul the sale and no abatement or compensation shall be allowed in respect thereof.
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> 29. The property is sold subject to these conditions and also the general conditions of sale known as "The (Revised) Singapore Conditions of Sale" and all Purchasers shall be deemed to have full knowledge and notice of the contents and effect thereof; whether they shall actually have inspected a copy or not.

The (Revised) Singapore Conditions of Sale, so far as relevant, provided as follows:

> 6. The outgoings will be discharged by the Vendor down to the day fixed for completion, as from which day all outgoings shall be discharged by and the rents and profits or possession shall belong to the Purchaser, (such outgoings, rents and profits, if necessary, being apportioned) but the Purchaser shall nevertheless not be let into actual possession or receipt of rents and profits until completion of the purchase, and the Purchaser shall on completion pay to the Vendor a due proportion of the current rates less the like proportion of the current outgoings.
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> 34. In case of conflict or repugnancy between the above Conditions and any Special Conditions imposed on any sale, the Special Conditions shall prevail and the above Conditions shall be deemed to be modified so far only as is necessary to give full effect to such Special Conditions.

Their Lordships turn to consideration of the property tax. This is imposed by the Property Tax Act. The relevant sections of the Act read as follows:

> 6.-(1) Commencing from 1 January 1961, a Property Tax shall, subject to the provisions of this Act, be payable at the rate or rates specified hereinafter for each year upon the annual value of all houses, buildings, land and tenements whatsoever included in the Valuation List ...
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> (2) The tax shall be payable half-yearly in advance, without demand, by the owner of such property at the offices of the Comptroller or other prescribed place or places in the months of January and July or within such other time in each half year as is prescribed.
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> (3) The tax shall be a first charge on the property concerned and, if not paid within the prescribed time, shall be recoverable in the manner hereinafter provided.
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> 34.-(1) If any sum payable in respect of any tax remains unpaid at the expiration of the prescribed time, a notice shall be served upon the person or any one of the persons, if more than one, liable to pay the same, calling on him to pay, within fifteen days of the service of such notice, such sum together with a fee of such amount as may be prescribed for the cost of the notice.
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> (3) If any such sum or any part thereof remains due and unpaid at the expiration of the said period of fifteen days or such further period as may be allowed by the Comptroller, it shall be deemed to be arrears of tax and may be recovered as hereinafter provided.
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> 35.-(1) For recovery of arrears the Comptroller shall have and may exercise...either or both of the powers following, that is to say:
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> (a) the Comptroller may issue a Warrant of Attachment and may seize by virtue thereof any movable property ... found on the premises ...;
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> (b) the Comptroller may ... sell by public auction ... the whole of such premises or such portion thereof or such interest therein as he deems sufficient for recovery of such arrears and costs.

The summons came before the learned Chief Justice on 28 April 1980. He decided in favour of the purchaser, but no note or transcript of his reasons exists. The learned Chief Justice made a declaration that, upon payment of the arrears of property tax to the Comptroller at the date of completion,

> "the plaintiffs [the purchaser] are subrogated to the rights of the Comptroller of Property Tax or the second defendants [Kaolim] to the extent of the amount paid in any surplus arising from the proceeds of sale held in trust for the second defendants".

Completion took place on 5 May. On that date the purchaser paid to the Comptroller the sum of $521,242.53 tax, and to the bank the sum of $6,400,000 representing the balance of the purchase money. An apportionment of the tax was thereafter made and $504,103.59, representing tax down to the date of completion, was recouped by the bank to the purchaser in accordance with the order of the learned Chief Justice.

The mortgagor appealed. The Court of Appeal dismissed the appeal. The judgment of the Court proceeded on the following lines:

(i) The learned Chief Justice had rightly not relied on the terms of the contract of sale. The mortgagor was not a party to that contract, and could not therefore rely upon clause 16(c) of the special conditions. In any event, the Court held that such clause was one of the general standard clauses found in a tender document when an owner offered his property for sale, and had no application to a sale by a mortgagee.

(ii) The learned Chief Justice "must have concluded that reason and justice demanded that the purchasers be subrogated either to the rights of the Comptroller or the owners who would be entitled to the surplus of the proceeds of sale of the property held in trust for them by the Bank". The Court of Appeal accordingly saw no reason to interfere with the order of the learned Chief Justice.

Their Lordships agree with the effect of the decision at first instance and on appeal, but respectfully differ as to the reasons for such conclusion.

At the time of the offer for sale by the bank, there was in existence a prior charge to secure the arrears of property tax. Therefore, when the bank came to sell, it was in substance selling as second mortgagee. The right of a second mortgagee is to sell the mortgaged property, which subject to incumbrances is the mortgagor's property, at the best price reasonably obtainable. The second mortgagee so selling has a choice. He can sell the mortgaged property free from the first charge. In this case the purchase price will reflect the full value of the unencumbered land. When therefore the purchaser pays the purchase money to the second mortgagee, the second mortgagee must discharge the first charge so that the purchaser is granted what the vendor has contracted to convey, namely an unencumbered estate. Normally the first mortgage will be discharged in advance of the receipt of the purchase money, or out of the purchase money before the net amount is paid to the mortgagor. Alternatively, the second mortgagee can sell the property subject to the first mortgage. In this case the purchase price will reflect only the value of the equity of redemption. When therefore the purchaser pays the purchase money to the second mortgagee, the second mortgagee will pay off his own debt and hand the entire balance to the mortgagor. The purchaser cannot require the second mortgagee or the mortgagor to pay to him the sum needed to discharge the first charge. Otherwise the purchaser will be granted more than he has contracted to buy which is only an encumbered estate. It follows that the question to be decided is whether, upon the true construction of the contract for sale, the purchaser bought the mortgagor's land as an encumbered or an unencumbered property, i.e. free from or subject to the charge for the property tax. If the former, the appeal fails. No question of subrogation arises.

Their Lordships therefore turn to the special and general conditions to discover whether the land was sold free from or subject to the property tax. The appellant (the mortgagor) relies on special condition 16, under which the property is sold subject to a mixed bag of incidents, including planning schemes, "notices, charges, Orders of Court, charging orders, caveats and Court or other claims affecting the property made or served whether before on or after the date of sale".

The respondent (the purchaser) relies on general condition 6, under which the vendor is obliged to discharge "outgoings" apportioned down to the date fixed for completion. The appellant seeks to meet this submission by referring to general condition 34. It admits that the property tax, being an annual tax upon the annual value of land, is an outgoing. But it says there is a conflict between special condition 16 and general condition 6 in relation to property tax, which must be resolved pursuant to general condition 34 in favour of special condition 16.

Their Lordships do not accept this last submission. The contract must be read as a whole. Taking the special conditions and the general conditions together, their Lordships feel no difficulty in excluding from special condition 16 a charge the subject matter of which is specifically dealt with elsewhere in the contract. An outgoing is specifically dealt with by general condition 6, which places the incidence on the vendor so far as the outgoing relates to the period before the date fixed for completion. This is the normal position on the sale of land. Such an outgoing, if secured by a charge, is thus taken out of special condition 16. This construction reconciles the two clauses and avoids the illogical conclusion which would free the vendor from the burden of an outgoing if the outgoing were a charge on the property but not if it were unsecured.

Their Lordships consider that special condition 16 cannot sensibly be read at its face value. In terms it covers any "charge ... affecting the property made...before...or after the date of Sale". It would be absurd to suppose, for example, that the contracting parties intended that the vendor should be exonerated from a charge for money borrowed by him prior to the contract, or should be at liberty to borrow money after the date of the contract and charge the debt on the property being sold. Despite the apparent width of condition 16, it was thought necessary to deal expressly with estate duty, which is a charge under the Estate Duty Act, instead of leaving the incidence of the charge to condition 16.

Their Lordships need not express an opinion on the precise ambit of the word "charge" in special condition 16. It is sufficient to decide that the special condition does not include an outgoing the incidence of which is regulated by general condition 6, just as it would not include estate duty the incidence of which is regulated by special condition 22.

Their Lordships accordingly dismiss the appeal. The appellant must pay the respondent's costs.

Also found at [1983] 1 CLJ 118